STATE OF MICHIGAN
SUPREME COURT

KATHLEEN M. GAYDOS, Personal Representative of the ESTATE OF DIANA LYKOS VOUTSARAS,
Plaintiff-Appellee,
and

SPIRO VOUTSARAS,
Plaintiff,
-v-

GARY L. BENDER, RICHARD A. CASCARILLA, LINDSAY NICOLE DANGL, VINCENT P. SPAGNUOLO, and MURPHY & SPAGNUOLO PC,
Defendants,
and

KENNETH M. MOGILL and MOGILL, POSNER & COHEN,
Defendant-Appellants,
and

KERN G. SLUCTER AND GANNON GROUP, PC,
Defendants-Appellees.

SC: 159107
COA: 340714
Ingham CC: 16-000263-NM

KATHLEEN M. GAYDOS, Personal Representative of the ESTATE OF DIANA LYKOS VOUTSARAS,
Plaintiff-Appellee,
and

SPIRO VOUTSARAS,
Plaintiff,
-v-

GARY L. BENDER, RICHARD A. CASCARILLA, LINDSAY NICOLE DANGL, VINCENT P. SPAGNUOLO, and MURPHY & SPAGNUOLO PC,
Defendants,
and

KENNETH M. MOGILL and MOGILL, POSNER & COHEN,
Defendant-Appellants,

SC: 159124
COA: 340714
Ingham CC: 16-000263-NM

and

KERN G. SLUCTER AND GANNON GROUP, PC,
Defendants-Appellees.

APPELLEE ESTATE OF DIANA LYKOS VOUTSARAS, BY KATHLEEN M. GAYDOS, PERSONAL REPRESENTATIVE'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

Dated: February 6, 2020

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INTRODUCTION

"*To be courageous (...) requires no exceptional qualifications, no magic formula, no special combination of time, place and circumstance. It is an opportunity that sooner or later is presented to us all.*" – John F. Kennedy

Presented with an issue of first impression for Michigan, the Court of Appeals rose to the occasion and courageously held that witness immunity is not a defense against professional malpractice against a party's own expert witness. *Estate of Voutsaras v Bender*, 326 Mich App 667; 929 NW2d 809 (2019). This decision now places Michigan among other states that have moved away from the long-standing doctrine that immunity extends to all witnesses. This doctrine has provided comfort to witnesses but leaves litigants whom have been prejudiced by lying or mistaken, negligent or reckless witnesses without a cause for redress. The Court of Appeals' decision aligns Michigan with other jurisdictions that appear to value protecting the innocent client from the negligence of a retained expert over the policy behind granting immunity to witnesses.

SUPPLEMENTAL QUESTION PRESENTED BY THE COURT

Does the privilege of witness immunity extend to retained expert witnesses sued for professional malpractice?

Mogill answers:	Yes
Slucter answers:	Yes
Estate answers:	No
Court of Appeals answered:	No

ARGUMENT

I. *MAIDEN* IS CLEARLY DISTINGUISHABLE FROM THE FACTS IN *VOUTSARAS* RENDERING IT INAPPLICABLE AS TO RETAINED EXPERTS AND WITNESS IMMUNITY.

In *Reno v Chung*, 220 Mich App 102; 559 NW2d 308 (1996), aff'd sub nom *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999), Reno brought an action against Yung Chung, M.D., Wayne County Medical Examiner, alleging that the medical examiner's incorrect testimony resulted in Reno's incarceration for the murder of his wife and child. The trial court granted Chung's motion for summary disposition based upon the public-duty doctrine found in *White v Beasley*, 453 Mich 308; 552 NW2d 1 (1996), holding that "as county medical examiner, [Chung] owed no duty to [Reno] when conducting an autopsy." *Id.* at 105.

The Michigan Supreme Court affirmed the Court of Appeals stating, "Furthermore, witnesses who testify during the course of judicial proceedings enjoy quasi-judicial immunity. This immunity is available to those serving in a quasi-judicial adjudicative capacity as well as 'those persons other than judges without whom the judicial process could not function.'" *Maiden v Rozwood*, 461 Mich at 133. "Statements made during the course of judicial proceedings are absolutely privileged, provided they are relevant, material, or pertinent to the issue being tried." *Maiden v Rozwood*, 461 Mich at 134, citing *Martin v Children's Aid Society*, 215 Mich App 88; 544 NW2d 651 (1996). "Falsity or malice on the part of the witness does not abrogate the privilege." *Maiden,* 461 Mich at 134, citing *Sanders v Leeson Air Conditioning Corp*, 362 Mich 692, 695; 108 NW2d 761 (1961). "The privilege should be liberally construed so that participants in judicial proceedings are free to express themselves without fear or retaliation. *Id.* "Plaintiff cannot avoid the protection of witness immunity by artful pleadings; the gravamen of plaintiff's action is determined by considering the entire claim." *Maiden*, 461 at 135.

Maiden is clearly distinguishable from the facts in *Voutsaras v Bender* in four clear ways. The underlying lawsuit in *Reno* was brought against a county employee, the medical examiner, who was protected under the public-duty doctrine. The Court of Appeals in *Reno* held that a county medical examiner is a public official. *Reno v Chung*, 220 Mich App at 105. In *White v Beasley*, 453 Mich at 316, it was held that this doctrine applies in Michigan and provides, as defined by Justice Cooley:

> that if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support an individual action for damages. [2 Cooley, Torts (4th ed), §300, pp 385-386.]

In affirming *Reno*, the *Maiden* Court acknowledged the Court of Appeals' extension of the public-duty doctrine and answered the question, "whether defendant medical examiner owed a duty to [Reno], a person under investigation for murder, as a consequence of performing an autopsy to ascertain the victim's cause of death and testifying as a state's witness against [Reno]." *Maiden v Rozwood* 461 at 130-131. The *Maiden* Court went further stating, "In determining whether the relationship between the parties is sufficient to establish a duty, the proper inquiry is 'whether the defendant is under an obligation for the benefit of the particular plaintiff . . . '" *Id.* citing *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992), quoting *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981). In its analysis, the *Maiden* Court cited the statutory powers and duties imposed upon a medical examiner and concluded that "Nothing in the statutory scheme has created duties to a criminal defendant; instead, the duty is owed to the state." *Maiden v Rozwood*, 461 Mich at 132. The *Maiden* Court concluded

"Because [Chung] owed no legal duty to [Reno], the gross negligence claim alleged is unenforceable as a matter of law." *Id.* at 135.

The origin of "quasi-judicial immunity" cannot and should not be overlooked. This doctrine

> as developed by the common law has as least two somewhat distinct branches, one focused more on the nature of the job-related duties, roles, or functions of the person claiming immunity and one focused more on the fact that the person claiming immunity made statements or submissions in an underlying judicial proceeding, at times referred to as the judicial-proceedings privilege

Denhof v Challa, 311 Mich App 499, 511; 876 NW2d 266 (2015).

In *Voutsaras*, the clear distinguishing facts are: (1) the underlying defendants are not county employees whose duties are imposed by statute. The underlying defendants are privately employed. (2) the defendants are not serving in a "quasi-judicial adjudicative capacity." The concept of "quasi-judicial adjudicative capacity" is often seen throughout Michigan's case law when immunity is granted to those persons performing in a government-type roll. See *Denhof v Challa*, 311 Mich App 499 (2015) (immunity granted to Friend of the Court), *Diehl v Danuloff*, 242 Mich App 120; 618 NW2d 83 (2000) (immunity granted to a licensed psychologist performing court-ordered psychological testing), *Martin v Children's Aid Society*, 215 Mich App 88; 544 NW2d 651 (1996) (immunity granted to a private organization under contract with the state to provided services for abused and neglected children); (3) The defendants are not "persons without whom the judicial process could not function." This distinguishing fact is illustrated by the role the defendants play as expert witnesses which differs from that of a county medical examiner or friend of the court whose statutory roles and duties specifically align each of these persons with the state; and finally, (4) In all of the cases wherein a defendant was suing a person seeking immunity, those parties were adversarial to each other. These defendants,

however, were not adversarial to Voutsaras. The defendants were specifically retained for their respective expertise.

II. THE POLICY CONCERNS USED FOR GRANTING IMMUNITY TO WITNESSES MUST BE REEVALUATED IN THE CONTEXT OF GRANTING SUCH IMMUNITY TO RETAINED EXPERT WITNESSES IN LIGHT OF THE BROADER PUBLIC INTEREST.

Public policy concerns have driven the continued application of witness immunity well past what is believed to be intended by the common law. In damage suits against witnesses, "the claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible." *Calkins v Sumner*, 13 Wis 193, 197 (1860). In *Maiden*, the Court stated that witness immunity "should be liberally construed so that participants in judicial proceedings are free to express themselves without fear of retaliation," *Maiden v Rozwood*, 461 Mich at 133 citing *Sanders v Leeson Air Conditioning Corp*, 362 Mich at 695, and that immunity is "also grounded in the need of the judicial system for testimony from witnesses who, taking their oaths, are free of concern that they themselves will be targeted by the loser of further litigation." *Maiden v Rozwood*, 461 Mich at 134 citing *Daoud v DeLeau*, 455 Mich 181, 202-203; 565 NW2d 639 (1997).

More states are no longer persuaded that these public policy concerns are being advanced by the application of witness immunity in cases where retained experts are negligent in their duties. In finding that witness immunity did not bar professional malpractice actions against an expert witness, the Supreme Court of Pennsylvania stated:

> We are unpersuaded, however, that those policy concerns are furthered by extending the witness immunity doctrine to professional negligence actions which are brought against an expert witness when the allegations of negligence are not premised on the substance of the expert's opinion.

***

> The goal of ensuring that the path to truth is unobstructed and the judicial process is protected, by fostering an atmosphere where the expert witness is forthright and candid in stating his or her opinion, is not advanced by immunizing an expert witness from his or her negligence in formulating that opinion. The judicial process will be enhanced only by requiring that expert witness to render services to the degree of care, skill and proficiency commonly exercised by the ordinarily skillful, careful and prudent members of their profession.

LLMD of Michigan, Inc. v Jackson-Cross Co, 559 PA 297, 306-07; 740 A2d 186 (1999).

The Supreme Court of Louisiana, in *Marrogi v Howard*, 805 So. 2d 1118 (2002), held that witness immunity did not extend to retained experts alleged to have failed to provide competent litigation support services. *Id.* at 1131. The Court agreed that "the fact finder must be able to rely on 'candid, objective, and undistorted evidence,'" *id* quoting *Briscoe v LaHue*, 460 US 325, 333; 103 S Ct 1108, 1114 (1983), but went on to say:

> However, we do not believe that shielding a client's own professional witness from malpractice liability is necessary to ensure that frank and objective testimony is presented to the fact-finder. A party's retained expert witness, rather than a court-appointed expert, for example, contracts for monetary remuneration with a party to assist in preparing and presenting his case not only in the best light possible but also, surely, in a competent fashion. Thus, the retained expert's function is not only to assist the court or fact-finder in understanding complicated matters, but also to render competent assistance in supporting his client's action against the client's opponent. The *Bruce* court assumed that in the absence of immunity, the expert would be motivated not simply by frankness and objectivity, but by the fear of exposure to civil liability among other considerations. Properly viewed, however, the roles of "hired gun" and servant of the court are not necessarily incompatible. In reality, the expert retained for litigation is hired to present truthful and competent testimony that puts his client's position in the best possible light. The expert witness's oath, the heat of cross-examination, the threat of a perjury prosecution, and, not least, the expert's professional ethics code all serve to limit the feared excesses of an expert subject to malpractice liability. Moreover, the absence of immunity will not only encourage the expert witness to exercise more care in formulating his or her opinion but also protect the litigant from the negligence of an incompetent professional. Given these considerations, witness immunity does not serve an overarching public purpose in barring a client's suit against his own hired professional who deficiently performs agreed upon litigation support services.

Id. at 1132 (internal citations omitted).

The principles outlined in *Maiden* will not be lost for failure to extend witness immunity to retained experts as its purpose was to insulate adverse witnesses from retaliatory litigation. The existence of liability for retained experts will require experts to be more careful and thorough resulting in more accurate, reliable testimony enhancing the judicial process. This holds true for those experts who are not "professionals" but provide similar services, such as academics, researchers, or others professionally active in their field through licensure but are not required to hold a professional degree in carrying out his or her role in their profession for which he or she hold himself or herself out to be an expert.

III. *MAIDEN* AND THE LEGAL PRINCIPLES FOR WHICH THAT HOLDING HAS STOOD IS OUTWEIGHED BY THE FUNDAMENTAL RIGHT OF ACCESS TO THE COURT

For more than two hundred years, the right of access to court has been viewed as "fundamental." Chief Justice Marshall recognized in *Marbury v Madison*, 5 U.S. 137, 163 (1803) that a person who has suffered a legally cognizable injury has a right to obtain a remedy in court:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.
>
> ***
>
> '[I]t is a general and undisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'
>
> ***
>
> '[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.'
>
> ***

> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Proponents of continuing the witness immunity doctrine, as is, often speak of what the "chilling effect" could be if immunity is not extended to retained experts. Those proponents fail to recognize what has been the continued, unilateral denial of an individual's fundamental access to courts. Extending witness immunity to retained experts hired to provide their services disregards the principle outlined in *Marbury* and completely forecloses a person's ability to exercise the right to access to the court for redress of grievances.

In *Briscoe*, 460 U.S. at 330-31, it is clearly stated: "The immunity of the parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law." Retained expert witnesses have, arguably, had free reign to conduct himself or herself in any manner plausible, without having any accountability to his or her client. This long-standing doctrine has allowed unscrupulous types to seemingly prey upon those dependent upon a specific expertise to seek relief from the courts. Continuing to provide immunity to retained expert witnesses whom provide substandard results will continue to shield these persons from liability and further violate a fundamental right to seek judicial intervention.

In sum, if this Court overturns the Court of Appeals' decision here, then parties to litigation will be denied access to the courts when they have retained an expert witness who commits professional malpractice in the rendering of the expert opinion, as occurred here. To honor the purpose of the adversarial system, and grant parties access to the courts, this Court should hold that a retained expert witness can be sued for their professional negligence.

CONCLUSION

This Court should follow other jurisdictions who have concluded that a party can sue their own retained expert witness for professional malpractice when that expert's failure to employ the standard of care results in damages to the party's case. The foundational basis for granting immunity to witnesses, as identified by this Court in *Maiden v Rozwood*, should not apply to retained expert witnesses. Instead, the witness immunity rule should be limited to those witnesses, such as in *Maiden*, who are quasi-governmental actors, and who witnesses who otherwise do not owe a duty to the party for whom they are testifying. A retained expert witness owes a duty to their client – the party who retained the expert witness to provide an expert opinion to the trial court. Therefore, immunity in this limited context of retained expert witnesses does not serve the purpose that it does for other types of witnesses. Reaching such a holding here would bring Michigan in line with other jurisdictions, and would also recognize the fundamental right of the parties to access the courts, which is denied to them when a retained expert witness commits professional negligence in rendering an expert opinion.

REQUEST FOR RELIEF

Appellee respectfully requests this Court affirm the Court of Appeals' decision.

Dated: February 6, 2020

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on February 6, 2020, the undersigned duly e-filed using the MiFile system pursuant to Amended Administrative Order 2014-23, and that the foregoing APPELLEE ESTATE OF DIANA LYKOS VOUTSARAS, BY KATHLEEN M. GAYDOS, PERSONAL REPRESENTATIVE'S SUPPLEMENTAL BRIEF was e-filed with the State of Michigan Supreme Court and e-served to all attorneys of record.

Dated: February 6, 2020

/s/ Shane W. Hilyard .
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